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95-909

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KOCH OIL COMPANY,

Petitioner,

v.

COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS AGAINST POWERINE OIL COMPANY, DEBTOR IN BANKRUPTCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: POWERINE OIL COMPANY, *Debtor.*	No. 92-56077
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS, *Appellant,* v. KOCH OIL COMPANY, *Appellee.*	BAP No. CC-90-1344-OjP OPINION

Appeal from the
Ninth Circuit Bankruptcy Appellate Panel
Ollason, Jones, and Perris,
Bankruptcy Judges, Presiding

Argued and Submitted
December 7, 1994—Pasadena, California

Filed July 12, 1995

Before: Jerome Farris, Cecil F. Poole
and Alex Kozinski, Circuit Judges.
Opinion by Judge Kozinski; Dissent by Judge Farris

SUMMARY

Bankruptcy/Preferential Transfers

The court of appeals reversed a decision of the Ninth Circuit Bankruptcy Appellate Panel (BAP) and remanded. The court held that the BAP erred in considering the right to draw on third-party letters of credit deciding whether an unsecured creditor had received a preference.

Powerine Oil Co. obtained a $250.6 million line of credit from a syndicate consisting of several banks and insurance companies. The loan was secured by most of Powerine's personal property. The security agreement provided that the collateral would serve as security for all letters of credit that had been or were issued in the future on Powerine's account.

Appellee Koch Oil Co. agreed to sell crude oil to Powerine. To secure Powerine's obligation, it designated Koch as beneficiary of two irrevocable standby letters of credit issued by First National Bank of Chicago, one of the lenders covered by the security agreement. The letters, which were to expire in 1984, covered the cost of the oil.

Less than 90 days after Powerine paid Koch $3.2 million for oil it had delivered, Powerine filed a chapter 11 bankruptcy petition. Appellant the Committee of Creditors Holding Unsecured Claims brought an action to recover the payment, claiming it was a preference. The bankruptcy court held that the transfer was protected by the "contemporaneous exchange for new value" exception and granted Koch's motion for summary judgment.

The BAP affirmed on a different ground, holding that the payment was not a preference because it did not enable Koch to recover more than it would in a chapter 7 liquidation. The BAP reasoned that, even if Powerine had not made the $3.2 million transfer, Koch would have been paid in full because it would have drawn on First

National's letters of credit. The BAP invoked a "rule of reason" to avoid what it viewed as an inequitable result. The BAP held that Koch's right to collect under the letters could be taken into account because the letters of credit had expired by the time the Committee initiated its preference action. The Committee appealed.

[1] Vis-a-vis Powerine, Koch was an unsecured creditor as it did not hold any security interest in Powerine's property. Because most of Powerine's assets on the date it filed for bankruptcy were subject to the lien held by the secured creditors, Powerine's unsecured creditors could expect to receive much less than one-hundred cents on the dollar in a chapter 7 liquidation. Consequently, Powerine's $3.2 million pre-petition payment enabled Koch to recover more than it would have in a chapter 7 liquidation, and it was, therefore, a preference. [2] That Koch had recourse against a third party in case the debtor defaulted had no bearing on the issue of whether the payment was a preference. [3] It was error to consider the right to draw on third-party letters of credit in deciding whether Koch had received a preference. Statutory language provided no basis for the BAP's "rule of reason."

[4] First National was only partially secured, and it did not have first claim on the security. [5] Only a portion of First National's contingent reimbursement claim was secured by the blanket lien. When Powerine paid Koch directly, First National's exposure under the letters of credit was reduced by a corresponding amount, and its contingent claim against Powerine's assets was thereby released, but only to the extent the claim was secured. Thus, Powerine received new value equal to the amount of the secured portion of First National's reimbursement claim. As to the unsecured portion of First National's claim, however, Powerine did not receive new value. The

"contemporaneous exchange for new value" exception, therefore, did not protect Koch's $3.2 million payment to the extent First National's reimbursement claim was unsecured. [6] The case was remanded for the bankruptcy court to determine what portion of the $3.2 million payment could be recovered from Koch.

Circuit Judge Farris dissented, stating that the plain language of 11 U.S.C. § 547(b)(5) did not limit consideration to funds from Powerine's estate.

COUNSEL

Thomas A. Ryan, McDermott, Will & Emory, Los Angeles, California, for the appellant.

Michael R. Hassan, Lord, Bissell & Brook, Chicago, Illinois, for the appellee.

OPINION

KOZINSKI, Circuit Judge.

Can an unsecured creditor be better off when the debtor defaults rather than paying off the debt? Yes: Law can be stranger than fiction in the Preference Zone.

I

Powerine Oil Company (the debtor here) obtained a $250.6 million line of credit from a syndicate consisting of several banks and insurance companies; the loan was secured by most of Powerine's personal property. The security agreement provided that the collateral would serve as security for all letters of credit that "have been, or are in the future, issued on the account of Debtor." ER 101-02.

Koch Oil Company thereafter agreed to sell crude oil to Powerine. To secure Powerine's obligation, it designated Koch as beneficiary of two irrevocable standby letters of credit issued by First National Bank of Chicago, one of the lenders covered by the security agreement. The letters, which were to expire in April 1984, totaled approximately $8.7 million, an amount at all times sufficient to cover the cost of the oil Koch sold to Powerine.

In January and February 1984, Koch billed Powerine $3.2 million for oil it had delivered in December and January. Powerine eventually paid this amount but, unfortunately for Koch, it also filed a chapter 11 bankruptcy petition less than 90 days later. The Committee of Creditors Holding Unsecured Claims (the Committee) eventually brought an action to recover the payment, claiming it was a preference under 11 U.S.C. § 547(b).[1]

The bankruptcy court held that the transfer was protected by the "contemporaneous exchange for new value" exception of 11 U.S.C. § 547(c)(1) and granted Koch's motion for summary judgment. the Bankruptcy Appellate Panel (BAP) affirmed on a different ground: It held that the payment wasn't a preference because it didn't enable Koch to recover more than it would in a chapter 7 liqui-

---

[1] Pursuant to Powerine's reorganization plan, any preferential transfers recovered for the estate will be divided equally between secured and unsecured creditors. The full amount of the January and February payments was $8.5 million, but only $3.2 million was paid more than 45 days after delivery. We agree with the BAP that Powerine incurred its debts on the date Koch delivered the oil, not (as Koch argues) the first date the exact amount of the debt could be determined. Accordingly, $3.2 million of the transfer wasn't covered by the "ordinary course of business" exception under the version of 11 U.S.C. § 547(c)(2) in effect at the time of the transfer. *See In re Gold Coast Seed Co.*, 751 F.2d 1118, 1119 (9th Cir. 1985).

dation. Even if Powerine hadn't made the $3.2 million transfer, the BAP reasoned, Koch would have been paid in full because it would have drawn on First National's letters of credit.

II

Bankruptcy Code section 547(b) sets forth the five elements of a preferential transfer.[2] The parties dispute only whether the last element—section 547(b)(5)—was satisfied here. Under this provision, the Committee must prove that Koch "received more than it would [have] if the case were a chapter 7 liquidation case, the transfer had not been made, and [Koch] received payment of the debt to the extent provided by the provisions of the Code." 4 Collier on Bankruptcy ¶ 547.08, at 547-45 (Lawrence P. King ed., 15th ed. 1995).

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[2] Section 547(b) provides:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition . . .
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (1986).

Whether section 547(b)(5)'s requirements have been met turns in part on the status of the creditor to whom the transfer was made. Pre-petition payments to a fully secured creditor generally "will not be considered preferential because the creditor would not receive more than in a chapter 7 liquidation." *Id.* at 547-47. With respect to unsecured creditors, however, the rule is quite different: "[A]s long as the distribution in bankruptcy is less than one-hundred percent, *any* payment 'on account' to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made." *In re Lewis W. Shurtleff, Inc.*, 778 F.2d 1416, 1421 (9th Cir. 1985).

[1] Vis-a-vis Powerine, Koch was an unsecured creditor as it didn't hold any security interest in Powerine's property. *See* 11 U.S.C. § 506(a). Because most of Powerine's assets on the date it filed for bankruptcy were subject to the lien held by the secured creditors, Powerine's unsecured creditors could expect to receive much less than one-hundred cents on the dollar in a chapter 7 liquidation. Consequently, Powerine's $3.2 million pre-petition payment enabled Koch to recover more than it would have in a chapter 7 liquidation, and it was therefore a preference.

The BAP came to the contrary conclusion by focusing on the fact that Koch could have drawn down the letters of credit, had Powerine not paid it directly. Since Koch would have recovered the full amount owed to it (albeit from First National) had Powerine defaulted, the BAP reasoned that the $3.2 million payment wasn't a preference.

[2] Courts have long held, however, that the key factor in determining whether a payment is a preference is the "percentage[ ] . . . [creditors'] claims are entitled to draw

out of the *estate of the bankrupt.*" *Swarts* v. *Fourth Nat'l Bank*, 117 F. 1, 7 (8th Cir. 1902) (emphasis added). Thus, the relevant inquiry focuses "not on whether a creditor may have recovered all of the monies owed by the debtor *from any source whatsoever*, but instead upon whether the creditor would have received less than a 100% payout" from the debtor's estate. *In re Virginia-Carolina Fin. Corp.*, 954 F.2d 193, 199 (4th Cir. 1992); *see also In re Formed Tubes, Inc.*, 41 B.R. 819, 821-22 (Bankr. E.D. Mich. 1984). That Koch had recourse against a third party in case the debtor defaulted thus has no bearing on this issue.

The BAP nonetheless invoked a "rule of reason" to avoid what it viewed as an inequitable result. ER 150. Koch's right to collect under the letters could be taken into account, the BAP held, because the letters of credit had expired by the time the Committee initiated its preference action. Koch was thus left far worse off because Powerine paid its bill rather than defaulting. The BAP recognized that a creditor's "rights against a surety are not relevant to whether a transfer is preferential so long as those rights are still in place after the preference action is commenced." It concluded, however, that "when that right of action against the surety no longer exists, it is incumbent upon the court to measure the net recovery that the transferee would have obtained from the surety had the transfer not been made." ER 150. The BAP cited no authority for this proposition and we construe it to have been an exercise of its equitable powers.

[3] Although bankruptcy courts are sometimes referred to as courts of equity, the Supreme Court has reminded us that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worth-*

ington v. *Ahlers*, 485 U.S. 197, 206 (1988). Equity may not be invoked to defeat clear statutory language, nor to reach results inconsistent with the statutory scheme established by the Code. *See In re Kelly*, 841 F.2d 908, 913 n.4 (9th Cir. 1988); *In re Shoreline Concrete Co.*, 831 F.2d 903, 905 (9th Cir. 1987). Because the statutory language here provides no basis for the BAP's "rule of reason," we conclude that it was error to consider the right to draw on third-party letters of credit in deciding whether Koch had received a preference.

III

Having determined that Powerine's $3.2 million payment to Koch was preferential under section 547(b), we must next determine whether any of section 547(c)'s exceptions apply. Placing heavy reliance on *In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224 (5th Cir. 1988), Koch contends the payment it received is protected by the "contemporaneous exchange for new value" exception of 11 U.S.C. § 547(c)(1).[3] In *Fuel Oil*, the debtor paid one of its unsecured creditors within 90 days of filing for bankruptcy. Like Koch, the creditor was the beneficiary of two letters of credit securing payment if the debtor defaulted. The issuing banks "held a security interest in [debtor]'s assets which at all times was equal to or in excess of [debtor]'s obligation to [the creditor]." *Id.* at 228.

---

[3] Section 547(c)(1) provides:

> The trustee may not avoid under this section a transfer . . . to the extent that such transfer was—
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1).

The Fifth Circuit held that the payment was protected by the contemporaneous exchange for new value exception, reasoning that, when the debtor paid the creditor, the banks' exposure under the letters of credit was reduced by a corresponding amount. The banks' contingent reimbursement claim against the debtor's assets was thereby released, giving the debtor new value. "This outcome is consistent with the principle underlying § 547(c)(1)," the Fifth Circuit noted, "because the release of the debtor's collateral offsets the transfer to the creditor, thereby resulting in no depletion to the debtor's estate." *Id.*; *see also In re E.R. Fegert, Inc.*, 887 F.2d 955, 959 (9th Cir. 1989).

[4] Unlike the banks in *Fuel Oil Supply*, which were fully secured, however, First National was only partially secured. When Powerine filed for bankruptcy, it had $282 million in secured debt and assets of only $66 million. Nor did First National have first claim on the security because the loan agreement provided that Powerine's debts would be secured "equally without preference or priority of any one over the other." ER 101.

[5] Only a portion of First National's contingent reimbursement claim was thus secured by the blanket lien. When Powerine paid Koch directly, First National's exposure under the letters of credit was reduced by a corresponding amount, and its contingent claim against Powerine's assets was thereby released, but only to the extent the claim was secured. Thus, Powerine received new value equal to the amount of the secured portion of First National's reimbursement claim. *See In re Robinson Bros. Drilling, Inc.*, 877 F.2d 32, 33-34 (10th Cir. 1989). As to the unsecured portion of First National's claim, however, Powerine didn't receive new value; the bank couldn't release a security interest in Powerine's assets it didn't in

fact have. The contemporaneous exchange for new value exception therefore doesn't protect Koch's $3.2 million payment to the extent First National's reimbursement claim was unsecured.

* * *

[6] We are unable to determine on this record how much of First National's contingent reimbursement claim against Powerine was secured. We therefore remand for the bankruptcy court to determine what portion of the $3.2 million payment may be recovered from Koch.

REVERSED and **REMANDED.**

FARRIS, Circuit Judge, dissenting:

Bankruptcy courts sit as courts of equity, but they may not avoid the plain language of a statute. *In re Shoreline Concrete Co.*, 831 F.2d 903, 905 (9th Cir. 1987). We must decide whether the Bankruptcy Appellate Panel's interpretation of 11 U.S.C. § 547(b)(5) is plausible.

Section 547(b)(5) states:

> [T]he trustee may avoid any transfer of an interest of the debtor in property—
>
> . . .
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The plain language of the statute does not limit consideration to funds from Powerine's estate. Under a hypothetical

chapter 7 liquidation, it could have collected from First National as "provided by the provisions of this title." In its opinion, the BAP ruled that "[n]othing in title 11 would prevent a draw down on the credits here at issue had Powerine filed bankruptcy without paying Koch."

In my opinion, the BAP's decision does not avoid the plain language of section 547(b)(5). I respectfully dissent.

APPENDIX B

[NOT FOR PUBLICATION]

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No.
	)	CC-90-1344-OJP
POWERINE OIL COMPANY,	)	
	)	Bk. No.
Debtor.	)	LA 84-7086-JD
	)	
	)	Adv. No.
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS,	)	LA 86-0897-JD
Appellant,	)	
v.	)	**MEMORANDUM**
	)	
KOCH OIL COMPANY,	)	
Appellee.	)	

Argued and Submitted on
July 17, 1991, at Pasadena, California

Filed July 23, 1992

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable James R. Dooley, Bankruptcy Judge, Presiding

Before: OLLASON, JONES, and PERRIS,
Bankruptcy Judges

Appellant Committee of Creditors Holding Unsecured Claims ("Committee") commenced an adversary proceeding to avoid alleged preferential transfers to Appellee Koch Oil Company ("Koch"). On cross motions for summary judgment, the bankruptcy court held that the payments constituted contemporaneous exchanges for new value which could not be avoided. We conclude that the new value defense was not fully available, but that the transfers were not preferential. Accordingly, we affirm the judgment of the bankruptcy court.

FACTS

Koch supplied crude oil. Debtor Powerine Oil Company ("Powerine") refined it. Koch regularly sold crude to Powerine, billing monthly for deliveries made during the preceding month. Consistent with their agreement and industry practice, the price of the crude was undetermined at the time of delivery. Instead, all of the oil was deemed delivered in equal amounts on each day of the month. Koch then billed Powerine at the daily rate reflected in an industry index. Neither the average daily delivery nor the price in effect each day could be determined until after the month in which the deliveries were made.

To ensure payment, Powerine opened two standby letters of credit in 1982 and 1983 at First National Bank of Chicago ("FNBC"). At all pertinent times, the credits totaled approximately $8,700,000. Koch could draw down the proceeds of the letters in the event that Powerine failed to make timely payment. The pertinent letters of credit expired by their terms on April 30, 1984.

Powerine was obligated to reimburse FNBC in the event of a draw down. That obligation was secured by Powerine's checking account at FNBC as well as other

assets. The agreement which gave rise to that security interest was entered into on May 29, 1981. It provided, in part:

> For value received, Debtor hereby assigns to Secured Party, as Trustee, and grants to Secured Party as Trustee, a security interest in, the collateral for the purpose of securing equally without preference or priority of any one over the other:
>
> A. Payment of the indebtedness evidenced by the Bank Notes and the Insurance Company Notes (collectively, the "Notes");
>
> B. Payment of obligations of Debtor to any one or more of the Banks under applications for letters of credit under which letters of credit have been, or are in the future, issued on the account of Debtor in favor of vendors of crude oil sold to Debtor.

The trustee under that agreement was Union bank, and the beneficiaries consisted of several insurance companies and banking institutions, including FNBC. At all material times, there was enough cash in the checking account to fully cover obligations arising from the letters of credit. However, the account balance was not sufficient to cover all of the obligations it secured.

Koch delivered 31,000 barrels of crude oil to Powerine on December 2-3, 1983, and another 124,000 barrels on December 9-12, 1983. On January 16, 1984, Koch billed Powerine $4,255,788.36 for those December deliveries. Full payment was made by wire transfer on January 20, 1984. On February 21, 1984, shortly after being billed for periodic crude oil deliveries during January, Powerine paid Koch $4,295,112.34, again by wire transfer. Both of those wire transfers were made with funds from Powerine's checking account at FNBC. In March, Powerine was billed $4,421,288.35 for the February shipments, but did not pay. Koch then drew down the letters of credit. FNBC then

debited Powerine's checking account for the full amount of the draw down pursuant to its contingent indemnification rights.

Powerine petitioned for relief under Chapter 11 of the bankruptcy code on March 26, 1984, scheduling $282 million in secured debt along with assets worth $66 million. Thereafter, the Committee commenced an adversary proceeding against Koch seeking to set aside the two wire transfers of January and February, both of which occurred within 90 days of Powerine's bankruptcy. The complaint alleged that the transfers constituted a preference under 11 U.S.C. § 547(b)[1] in the amount of $8,550,900.70. Koch answered and asserted that the transfers were protected from avoidance by § 547(c)(1) as a contemporaneous exchange for new value and by § 547(c)(2) as a payment in the ordinary course of business.

The Committee later amended its complaint to seek only $3,209,425.81, conceding that the rest of the payments were made within 45 days after coming due and were thus insulated by the ordinary course of business defense found in § 547(c)(2). Although that subsection no longer expressly requires that a payment in the ordinary course of business be made within 45 days after the debt is incurred, prior law applies to the subject transfers. The delivery of December 2-3, 1983, clearly preceded the payment made on January 20, 1984, by more than 45 days. The delivery of December 9-12, 1984, clearly did not precede the payment made on January 20, 1984, by more than 45 days. Similarly, only a portion of the February payment compensated Koch for January deliveries made more than 45 days before.

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[1] Unless otherwise stated, all references to "sections" refer to the Bankruptcy Code, 11 U.S.C. §101 (1988) et seq.

On cross-motions for summary judgment, the bankruptcy court found that the transfers then at issue, in the amount of $3,209,425.81, were not subject to the ordinary course of business defense because they trailed delivery by more than 45 days. The court also found that the payments could not have been made unless FNBC released its lien on a like amount of funds in Powerine's checking account. Accordingly, the court concluded that the transfers were contemporaneous exchanges for new value and hence not avoidable:

> The letters of credit insured Koch would receive full payment in lieu of performance, and that the debtors checking account as collateral fully secured the bank. When the bank released its security interest in the checking account new value was given to the debtor. *Matter of Fuel Oil Supply and Terminaling, Inc.*, 837 F.2d 224, 228 (5th Cir. 1988); *Cf. In re E.R. Fergert, Inc.*, 88 B.R. 258 (9th Cir. BAP 1988). The release of the debtor's collateral offsets the transfer to the creditor, thereby resulting in no depletion to the debtor's estate. [Citations omitted]. Therefore, the court finds that 11 U.S.C. §547(c)(1) protects the transfer to Koch from avoidance.

The Committee brought this timely appeal, contending that neither the contemporaneous exchange for new value defense nor the ordinary course of business defense are applicable to the transfers at issue. Koch contends that both apply.

ISSUES AND STANDARD OF REVIEW

The questions presented for review are whether the payments to Koch were made as a contemporaneous exchange for new value and whether they were made in the ordinary course of business. The material facts were not disputed and judgment was entered summarily. We

review questions of law and summary judgments *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986); *In re California Trade Technical Schools, Inc.*, 923 F.2d 641 (9th Cir. 1991).

DISCUSSION

The Committee contends that the debt was incurred upon delivery for the purpose of determining the 45-day period. If we accept that position, Koch argues persuasively that industry practice and its contracts with Powerine make the ordinary course of business defense of former § 547(c)(2) virtually inapplicable to payments for crude oil deliveries made near the beginning of the month. Because the price of each month's deliveries could not be fixed until its conclusion, as much as 30 days could elapse from delivery to price calculation, thereby substantially shortening the 45 day "window" contemplated by the statute. Koch cites *In re H & A Construction Co., Inc.*, 65 B.R. 213 (Bankr. D. Mass. 1986), *In re Georgia Steel, Inc.*, 38 B.R. 829 (Bankr. M.D. Ga. 1984), *In re Thomas W. Garland, Inc.*, 19 B.R. 920 (Bankr. E.D. Mo. 1982), and *In re Mindy's, Inc.*, 17 B.R. 177 (Bankr. S.D. Ohio 1982), for the proposition that a more reasoned approach should guide the determination of when a debt is incurred. Those cases present a compelling logic, and explain, perhaps, why Congress repealed the 45 day limitation of former law. But under the law of this circuit, a debt is incurred upon delivery. *In re Gold Coast Seed Co.*, 751 F.2d 1118, 1119 (9th Cir. 1985).

The amount of a debt need not be determined for the debt to have been incurred. A debt is liability on a claim. 11 U.S.C. § 101(12) (Supp. 1990). Under § 101(4), a claim is a "right to payment, whether or not such right is re-

duced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *See also Barash v. Public Finance Corp.*, 658 F.2d 504, 510 (7th Cir. 1981); *In re Energy Coop., Inc.*, 80 B.R. 921 (Bankr. N.D. Ill. 1987). The bankruptcy court correctly determined that the passage of more than 45 days from delivery prevented Koch from relying on the ordinary course of business defense to shield the transfers from avoidance.

In concluding that Koch was protected by the contemporaneous exchange for new value defense of § 547(c)(2), the bankruptcy court relied on *In re Fuel Oil Supply and Terminaling, Inc.*, 837 F.2d 224 (5th Cir. 1988), and *In re E.R. Fergert, Inc.*, 88 B.R. 258 (9th Cir. BAP 1988). As in the subject case, those cases each involved a three faceted relationship in which the creditor had recourse against a third party in the event that the debtor failed to pay. Recourse pursuant to the letter of credit in *Fuel Oil*, and recourse pursuant to the guarantee in *Fergert*, each would have occasioned a fully secured obligation in favor of the third party and against the debtor. That contingent, secured liability was forever released, however, when those debtors paid their creditors. Those releases constituted new value equal in amount to the payments made. *Fergert*, 88 B.R. at 259-60; *Fuel Oil*, 837 F.2d at 228-31. The Committee attempts to distinguish the operative facts of *Fergert* and *Fuel Oil* from those presented here in two respects.

The Committee first points out that the payment by the debtor to the creditor in *Fergert* and *Fuel Oil* operated to extinguish the claim of the creditor against the third party. In *Fergert*, the debtor's payment triggered a release of the surety by the contractor creditor. In *Fuel Oil*, one of two letters of credit was specifically released

by the creditor; the other could not be drawn down before expiring because of the payment. In both *Fergert* and *Fuel Oil*, payment by the debtor to the creditor resulted in the third party's substantially contemporaneous release of its contingent indemnification claim against the debtor and the debtor's collateral.

Contrarily, the Committee notes that the letters of credit presently under inquiry did not expire and were not released upon payment by Powerine for the crude oil deliveries. Instead, they remained in full force and were indeed drawn down the following month. Because those letters were not released, Powerine remained subject to FNBC's secured, contingent indemnification rights, which in fact resulted in a debit to Powerine's checking account after the March draw down. The Committee thus argues that no new value was given by Koch or received by debtor because the letters of credit were not expressly released. We disagree.

Each time a wire transfer was made to Koch from debtor's account, FNBC's exposure on the letters of credit was reduced in a like amount. For each reduction in FNBC's exposure on the letters, there was a corresponding release of its right to indemnity from debtor's account. A new shipment would give birth to a new obligation and payment would lay it to rest. Thus, at the time of each transfer, a secured, contingent indemnification liability exactly equal to the payment was released. Had the credits been expressly released or entirely drawn down due to non-payment, Koch would have shipped at its own peril. But with the same letters of credit unused and still in place, subsequent shipments required no further agreements. Koch and Powerine simply preferred a long term arrangement to several short ones. The issuance of monthly letters of credit, instead of the longer term documen-

tary credits used here, would not have affected "the equality of distribution of estate assets" which is the chief concern of § 547. *See In re Fergert*, 88 B.R. at 259.

The second distinction noted by the Committee is that the contingent indemnification liability in *Fuel Oil* and *Fergert* would have resulted in third party claims against the debtors that were fully secured by assets of their respective estates. Payments to the creditors in those cases thus had no impact upon the distribution to creditors of those debtors. *Fuel Oil*, 837 F.2d at 230-31; *Fergert*, 88 B.R. at 259.

In contrast, the security agreement allowing FNBC to collect from Powerine's checking account in the event of a draw down also encompassed numerous other obligations of Powerine that vastly exceeded Powerine's assets. Had no transfers been made to Koch from Powerine's checking account, Koch would have drawn down the documentary credits issued by FNBC. FNBC would then have had an indemnification claim against Powerine in a like amount, secured by Powerine's checking account.

The balance of that checking account would not have been reduced on account of Koch's satisfaction, and the additional funds retained by not making the payment would have equaled exactly the amount of FNBC's secured indemnification claim. Because the claims against Powerine's checking account exceeded its balance, however, they were not fully secured. Since the agreement of May 29, 1981, made the account "collateral for the purpose of securing equally without preference or priority of any one over the other," FNBC was secured only by a portion of the balance equal to its portion of the debt. Accordingly, FNBC's indemnity claim upon draw down would have been partially secured and partially unsecured. Extinction of that contingent claim provided new value

only to the extent that it would have been secured. The § 547(c)(1) defense is not available as to that portion of the transfer to Koch which would otherwise have resulted in the unsecured portion of FNBC's contingent indemnity claim.

Nevertheless, it seems incongruous to us that Koch, who billed Powerine promptly and was paid only four days thereafter, must disgorge notwithstanding that it would have recovered fully on the now expired letters of credit had payment not been made. Powerine entered into an agreement with FNBC whereby FNBC would bear the risk of Powerine's inability to pay Koch. Koch entered into an agreement with Powerine that was conditioned upon FNBC, rather than Koch, bearing the risk of Powerine's inability to pay Koch. Presumably, FNBC was compensated for bearing that risk. If Powerine's tender to Koch is preferential as to Koch, and if Koch cannot now draw down on the expired credits, these agreements will be nullified.

Avoidance would thus occasion an entirely different result than would have attached had no transfers occurred. Koch's recovery on the standby letters of credit would be replaced by an unsecured claim against the debtor, and all unsecured creditors would receive a smaller distribution on account of their claims. Avoidance would not, however, occasion the undersecured indemnity claim that would have resulted from a draw down if no transfers had been made. It would return funds to the collateral account, without the corresponding increase in claims against that account. Avoidance would thus provide a larger recovery for secured creditors at the expense of unsecured creditors.

The court in *Fuel Oil* expressly declined to consider the effect of § 547(b)(5) upon similar facts because it found the § 547(c)(2) defense clearly applicable. 837 F.2d at 227. The

elements of a preferential transfer are set forth in 11 U.S.C. § 547(b):

> Except as provided in subsection (c) of [§ 547], the trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) [within a year if such creditor was an insider]; and
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case were a case under chapter 7 of title 11;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of title 11.

The transfer in the case before us was a payment by the debtor, within the preference period and on account of an antecedent debt, to a creditor who was the beneficiary of certain letters of credit. Letters of credit allow supplying creditors such as Koch to obtain assurance without becoming immersed in the business of providing financial services. Their commercial utility rests upon certainty of payment when the required documents are tendered. *See KMW International v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 15 (2d Cir. 1979); 9 Kozolchyk, *Letters of Credit*, International Encyclopedia of Comparative Law Ch. 5, § 1 at 3-4, § 20.01 at 455 (1979).

Nothing in title 11 would prevent a draw down on the credits here at issue had Powerine filed bankruptcy without paying Koch. Neither a letter of credit nor its pro-

ceeds are property of a debtor's estate. *In re Air Conditioning, Inc.*, 845 F.2d 293 (11th Cir. 1988); *In re Security Services, Inc.*, 132 B.R. 411 (Bankr.W.D.Mo. 1991); *cf. Fuel Oil*, 837 F.2d at 229. Upon the occurrence of conditions precedent, the issuing bank must pay the beneficiary creditor upon demand. That obligation among nondebtors is wholly independent of the debtor and the debtor's arrangement with the issuing bank, and it is not stayed by 11 U.S.C. § 362. *Id.* at 416-17; *In re Val Decker Packing Co.*, 61 B.R. 831, 838-39 (Bankr.S.D.Ohio 1986) (and cases collected therein); *In re Prime Motor Inns*, 130 B.R. 610, 613-14 (S.D.Fla. 1991). Therefore, had Powerine failed to make the wire transfers, Koch would have drawn down in the amount of the transfers and would have had no claim against the estate. *See Id.*; *In re Security Services, Inc.*, 132 B.R. at 416-17 (and cases collected therein). The wire transfers thus did not enable Koch "to receive more than it would receive if the transfer had not been made and the debtor's estate was liquidated according to the provisions of the Bankruptcy Code." *In re California Trade Technical Schools, Inc.*, 923 F.2d 641, 642 (9th Cir. 1991).

The transfers did enable FNBC to recover more. As *Fuel Oil* recognized, debtor's "prebankruptcy performance effectively absolved the Banks of liability." 837 F.2d 224, 229. Had Koch drawn down, FNBC's indemnity claim would have been undersecured. Payment to Koch was thus equivalent to full payment on the undersecured indemnity claim FNBC would have had if the payments had not been made. By holding that new value received by a debtor need not be provided by the creditor to whom the transfer was made but may be provided by a fully secured third party, 837 F.2d 224, 231, *Fuel Oil* suggests that an issuer bank could be a constructive transferee of

a debtor's payment to a creditor beneficiary. *See also In re Security Services*, 132 B.R. at 416. But whether the wire transfer at issue here allowed FNBC to recover more than the Code would have provided is not before us, nor is FNBC, who would be indispensable to that inquiry.

Just as FNBC is not before us, the dissent pointedly notes that neither are any issues arising under 11 U.S.C. § 547(b)(5). The dissent further admonishes that the case law construing 11 U.S.C. § 547(b)(5)(C) does not permit consideration of a right to receive payment from third parties in deciding whether a transfer is preferential. *See In re Formed Tubes, Inc.*, 41 B.R. 819, 821 (Bankr.E.D.Mich. 1984); *In re Hillcrest Foods, Inc.*, 40 B.R. 360, 365 (Bankr. D.Me. 1984). However, the facts of record clearly implicate § 547(b)(5), and plainly demonstrate that those cases are too broadly caged.

The primary thrust of Koch's position before the bankruptcy court was that the transfers were made on account of a debt that was fully secured by the documentary credits. That fact alone implicates § 547(b)(5) and the question regarding whether the transfers were preferential.

Under *Hillcrest* and *Formed Tubes*, Koch's right to look to FNBC for payment is not relevant to the question of whether the transfers to Koch from FNBC were preferential:

> A creditor may be secured, but a payment to him is not necessarily protected. Payment to a creditor is protected only if the creditor is secured by property of the estate and the property subject to its security interest equals or exceeds the amount paid to the creditor by the debtor.

Matter of Formed Tubes, Inc., 41 B.R. at 821. *Accord, In re Hillcrest Foods, Inc.*, 40 B.R. at 365. The rule

stated in those cases has its genesis in *Swarts v. Fourth National Bank*, 117 F. 1 (8th Cir. 1902):

> Those creditors who are entitled to receive out of the estate of the bankrupt the same percentage of their claims are in the same class, however much their owners may have the right to collect from others than the bankrupt. Their relations to third parties, their right to collect of others, the personal security they may have through indorsements or guaranties, receive no consideration, no thought. It is the relation of their claims to the estate of the bankrupt, the percentage of their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relation of the creditors to the estate, and fix their classification and their preferences.

Id. at 7.

Swarts and its progeny would not allow consideration of the letters of credit in assessing whether Koch received more on account of the transfers than it would receive in liquidation. Rather, those cases require the court to consider only what Koch would have received from the estate in bankruptcy. That Koch would never have filed a claim, instead looking solely to the documentary credits, has no relevance under their test. § 547(b)(5)(C) directs the court to compare the amount of the transfers with the amount that would be paid if "such creditor received payment of such debt to the extent provided by the provisions of this title." That subsection does not direct a comparison with the amount that would be paid if "such creditor received payment from the debtor's estate."

As enacted, the statutory language permits a rule of reason when necessary carry out its intent. Its purpose is to maintain, rather than obfuscate, the distribution scheme contained in the bankruptcy code. A transferee's rights against a surety are not relevant to whether a

transfer is preferential so long as those rights are still in place after the preference action is commenced because avoidance would then place the parties in the same position they would have occupied in the absence of the transfer. But when that right of action against the surety no longer exists, it is incumbent upon the court to measure the net recovery that the transferee would have obtained from the surety had the transfer not been made. The transfer is preferential as to the transferee to the extent it exceeds that hypothetical recovery. The transfer is preferential as to the surety to the extent its liability on the guarantee is decreased by the transfer.

It the wire transfers had not been made in the subject case, Koch would have recovered fully on the credits. That fact is amply demonstrated by Koch's subsequent draw down on the same credits, which were in an amount sufficient to cover that draw down and the wire transfers presently at issue. Accordingly, all of the transfers to Koch were protected by the documentary credits or a defense under subsection (c).

CONCLUSION

Avoidance of a preferential transfer is purposed upon placing the estate and its creditors in the same position they would occupy had no transfer been made. Where a transferee's right to payment from a third party surety terminates after the challenged transfer but before its avoidance, the transferee's potential recovery from the surety is relevant to whether the transfer is preferential to the transferee under subsection (b)(5). Since the continuing documentary credits were in an amount sufficient to cover both the subsequent draw downs and the wire transfers here at issue, Koch recovered no more than it would have recovered under Title 11 had no transfers

been made. Accordingly, the judgment of the bankruptcy court is affirmed.

PERRIS, Bankruptcy Judge, dissenting:

While it may be commercially practical and equitable to protect Koch from preference liability, I do not believe that such a result may be reached under the pertinent statutory language. Although I agree with the majority that the transfer is not protected by sections 547(c)(1) and 547(c)(2), I disagree with the majority's conclusion under section 547(b)(5). Under the language of section 547(b)(5)(C), the pertinent focus is on the extent payment to the creditor is provided by the provisions of the Bankruptcy Code. The analysis should not consider the effect of the right to payments from third parties. *See In re Virginia-Carolina Financial Corp.*, 954 F.2d 193, 198-99 (4th Cir. 1992); *In re Formed Tubes, Inc.*, 41 B.R. 819, 821 (Bank. E.D. Mich. 1984); *In re Hillcrest Foods, Inc.*, 40 B.R. 360, 365 (Bank. D. Me. 1984). Because the majority improperly considers potential third party payments, I believe that it misconstrues section 547(b)(5) and engages in the type of judicial legislation that has been condemned in recent Supreme Court decisions.[2] *See Patterson v. Shumate*, ___ U.S. ___, 112 S.Ct. 2242, 2250-51 (1992) (Scalia, J., concurring); *Union Bank v. Wolas*, ___ U.S. ___, 112 S.Ct. 527, 534 (1991) (Scalia, J., concurring). I therefore dissent.

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[2] I also question whether the majority's determination of this appeal on the basis of section 547(b)(5) involves impermissible factual findings by an appellate tribunal, *see In re Hall, Bayoutree Assoc., Ltd.*, 939 F.2d 802, 804 (9th Cir. 1991), especially given the summary judgment context of the bankruptcy court's decision and the fact that neither party raised this issue.

APPENDIX C

[Filed January 9, 1990]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	No. LA 84-07086-JD
POWERINE OIL COMPANY, a California corporation,	Adv. No. LA 86-0897-JD
Debtor.	Chapter 11
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS,	Date: September 12, 1989 Time: 3:00 p.m.
Plaintiff,	Place: Courtroom E
vs.	
KOCH OIL COMPANY,	
Defendant.	

MEMORANDUM OF DECISION GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment may be granted only if there are no genuine issues of material fact to be tried and the moving party is entitled to summary judgment as a matter of law. Rule 56 of the Federal Rules of Civil

Procedure, which is made applicable to this case by Bankruptcy Rule 7056; *Anderson vs. Liberty Lobby*, Inc., 477 U.S. 242, 247-252 (1986); *Celotex Corp. vs. Catrett*, 477 U.S. 317, 322-327 (1986); *Matsushita Electrical Industrial Co. vs. Zenith Radio*, 475 U.S. 574, 585-587 (1986); *United Steel Workers of America vs. Phelps Dodge*, 865 F.2d 1539, 1541 (9th Cir. 1989); *Richards vs. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987); *T.W. Elec. Service vs. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987).

The court has concluded that the defendant's cross-motion for summary judgment should be granted on the ground that new value was given in accordance with 11 U.S.C. §547(c)(1).

The letters of credit insured that Koch would receive full payment in lieu of performance, and that the debtors checking account as collateral fully secured the bank. When the bank released its security interest in the checking account new value was then given to the debtor. *Matter of Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224, 228 (5th Cir. 1988); Cf. *In re E.R. Fegert, Inc.*, 88 B.R. 258 (9th Cir. BAP 1988). The release of the debtor's collateral offsets the transfer to the creditor, thereby resulting in no depletion to the debtors estate. *Matter of Fuel Oil Supply & Terminaling, Inc.*, supra, at 228; *In re Auto-Train Corp.*, 49 B.R. 605, 612 (Bankr. D.C. 1985). Therefore, the court finds that 11 U.S.C. §547(c)(1) protects the transfer to Koch from avoidance.

It should be noted that the court in its ruling does not conclude that the payments were made in the ordinary course of business. With respect to this issue the court finds in favor of plaintiff's argument that under 11 U.S.C. §547(c)(2)(B), the payments were not made in the ordinary course of business.

Counsel for the defendant is directed to serve and lodge within 30 days from this date proposed findings of fact and conclusions of law and a proposed judgment both for the signature of the court. The findings of fact should consist of undisputed facts only determined in accordance with Local Bankruptcy Rule 111(5).

Dated: January 9, 1990

/s/ James R. Dooley
Bankruptcy Judge

[Certificate of Mailing omitted in printing.]

APPENDIX D

[Filed March 29, 1990]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. LA 84-07086-JD [Chapter 11]
POWERINE OIL COMPANY, a California corporation, Debtor.	Adv. No. LA 86-0897-JD
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS, Plaintiff, vs. KOCH OIL COMPANY, Defendant.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY DEFENDANT KOCH OIL COMPANY BASED UPON THE COURT'S MEMORANDUM DECISION OF JANUARY 9, 1990

FINDINGS OF FACT

1. The debtor, Powerine Oil Company ("Powerine"), filed a voluntary petition for relief under Chapter 11 of

the Bankruptcy Code on March 26, 1984. This adversary proceeding was instituted against defendant Koch Oil Company ("Koch") pursuant to 11 U.S.C. §§ 547 and 550 to avoid and recover certain transfers of property made by Powerine to Koch.

2. In its complaint, the plaintiff originally sought to recover $8,550,900.70 from Koch as allegedly preferential payments for crude oil, $4,255,788.36 of which was paid by Powerine on January 20, 1984 for December 1983 deliveries, and $4,295,112.34 of which was paid by Powerine on February 21, 1984 for January 1984 deliveries. In its answer, Koch pled affirmative defenses under 11 U.S.C. Section 547(c)(1) and (c)(2).

3. In its motion for summary judgment, plaintiff reduced the amount claimed as a preference. Plaintiff concedes that all of Powerine's debt to Koch was incurred in the ordinary course of the parties' business and that the disputed transfers were made in the ordinary course of the parties' business and according to ordinary business terms. (Plaintiff's Memorandum of Points and Authorities, pp. 4, 7, 13-15, 21) Plaintiff now claims, however, that of the $8,550,900.70 originally claimed in the complaint, $3,209,425.81 was paid more than 45 days after Powerine incurred a debt to Koch and that this latter amount is not shielded from avoidance under 11 U.S.C. §547(c)(2). Of the $3,209,425.81 the plaintiff claims, $862,386.35, was paid on January 20, 1984 for December 2 and 3, 1983 deliveries of crude oil and the remainder was paid on February 21, 1984 for January 1 through 6, 1984 shipments of crude oil.

4. In 1982 and 1983, Koch entered into two contracts with Powerine for the sale of specified amounts of crude oil to be delivered to Powerine via pipeline from Four Corner Pipeline Company's Hynes facility ("Four Corners")

to Powerine's receiving facility. In 1984, the parties entered into an agreement for the sale of specified amounts of crude oil to be delivered to Powerine's refinery by truck. (Declaration of Robert S. Dolechek, hereinafter "Dolechek Dec.", para. 4; Declaration of Henry Del Castillo, hereinafter "Del Castillo Dec.", paras. 5-8)

5. Powerine's obligations under all three contracts were secured by letters of credit in Koch's favor issued by the First National Bank of Chicago ("FNBC") that insured that Koch would receive full payment from FNBC if it elected to draw under the letter of credit rather than being paid directly by Powerine. (Deposition of Steven Eastwood, hereinafter "Eastwood Dep.", at 15-20 (11-14*); Group Exhibit 1 to Defendant's Statement of Uncontroverted Facts and Conclusions of Law, hereinafter "Defendant's Statement"; Plaintiff's Statement of Genuine Issues, para. 1)

6. If FNBC made a payment to Koch under the letters of credit, Powerine was obligated to reimburse FNBC in full. Powerine's obligation to reimburse FNBC was secured by, among other assets, the cash in Powerine's checking account at FNBC. (Eastwood Dep. at 12-15, 24-25 (8-11, 15-16); Deposition of Henry Del Castillo, hereinafter "Del Castillo Dep.", at 25 (63); Group Exhibits 1 and 2 to Defendant's Statement; Plaintiff's Statement of Genuine Issues, para. 1)

7. At all relevant times, there was sufficient cash in Powerine's FNBC checking account to fully secure Powerine's obligations to reimburse FNBC if FNBC made a

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* The page numbers in the parentheses represent the page numbers of the referenced material attached to Defendant's Statement of Uncontested Facts and Conclusions of Law.

payment to Koch under its letters of credit. (Eastwood Dep. at 25-26, 30-34 (16-17, 19-23)

8. Koch did not draw upon the letters of credit for the payments in dispute. Instead, Powerine instructed FNBC to wire transfer funds to Koch from Powerine's checking account at FNBC. This was the same checking account given as security for Powerine's obligations to FNBC. On January 20, 1984, Powerine paid Koch by wire transfer $4,255,788.36 for December crude oil deliveries, and on February 21, 1984, it paid Koch by wire transfer $4,295,112.34 for January deliveries. (Del Castillo Dec., paras. 11-14, 19-23, Exhibits 6, 7, 8, 9.1, 9.2, 14, 15, 16, 17, 18.1, 18.2 attached thereto; Plaintiff's Statement of Genuine Issues, para. 1)

9. FNBC released its security interest in the funds in Powerine's checking account to enable Powerine to transfer the funds from its checking account on January 20 and February 21, 1984 to make the above payments to Koch. If Koch, rather than having been paid directly by Powerine, had drawn upon the FNBC letters of credit for the payments in dispute, FNBC would have reimbursed itself by debiting Powerine's checking account in the amount of the draws. (Eastwood Dep. at 12, 24-34 (8, 15-23); Plaintiff's Statement of Genuine Issues, para. 1) There was thus no net depletion of Powerine's assets by the above described wire transfers.

10. Run tickets prepared by Four Corners and transmitted to Powerine show that deliveries of oil to Powerine from Koch through Four Corners occurred on December 2 and 3, 1983, and January 1, 2, and 3, 1984. (Del Castillo Dec., paras. 9, 15 and Exhibits 4, 10 attached thereto) The value of the crude oil delivered on these dates is $3,167,350.31. Powerine's payment on January 20, 1984 for

all of the December deliveries is more than 45 days from the December 2 and 3, 1984 deliveries. Powerine's payment on February 21, 1984 for all of the January deliveries is more than 45 days from the January 1, 2 and 3, 1984 deliveries.

* * * * *

CONCLUSIONS OF LAW

1. Jurisdiction of this Court is founded on 28 U.S.C. §§ 157 and 1334 (as enacted or amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984), in that this adversary proceeding is a civil proceeding which is a core proceeding arising under Title 11 of the United States Code and arising in a case under Title 11 of the United States, *In re Powerine Oil Company, a California corporation*, Bk. No. LA 84-07086-JD, United States Bankruptcy Court, Central District of California, and in that this adversary proceeding has been referred to this Bankruptcy Court by the United States District Court for the Central District of California.

2. Powerine's payments to Koch on January 20, 1984 and February 21, 1984 were part of contemporaneous exchanges for new value under 11 U.S.C. §547(c)(1) because in connection with each payment FNBC released its security interest in Powerine's checking account so that the funds could be transferred to Koch. The plaintiff is not entitled to recover any portion of the $8,550,900.70 Powerine paid Koch on those dates including the $3,209,425.81 which it now claims is preferential.

3. Under 11 U.S.C. Section 547(c)(2), Powerine incurred a debt to pay Koch for the crude oil on the dates specified on the run tickets prepared by Four Corners, i.e., December 2 and 3, 1983 and January 1, 2 and 3, 1984.

4. Powerine's debts to Koch were incurred in the ordinary course of business and its payments to Koch were made in the ordinary course of business and according to ordinary business terms under 11 U.S.C. Section 547(c)(2). Payments totalling $3,209,425.81 were made, however, more than 45 days after Powerine incurred a debt to Koch. These payments would not be shielded from avoidance under Section 547(c)(2).

/s/ James R. Dooley
United States
Bankruptcy Judge

Dated: March 29, 1990

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[Affidavit of Service omitted in printing.]

APPENDIX E

[Filed March 29, 1990]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. LA 84-07086-JD [Chapter 11]
POWERINE OIL COMPANY, a California corporation, Debtor.	Adv. No. LA 86-0897-JD
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS, Plaintiff, vs. KOCH OIL COMPANY, Defendant.	

SUMMARY JUDGMENT

At Los Angeles, California, in said district, on this 29th day of March, 1990:

On September 12, 1989, the motion of plaintiff Committee of Creditors Holding Unsecured Claims for Sum-

mary Judgment and the cross-motion of defendant Koch Oil Company for summary judgment came on regularly for hearing before the undersigned United States Bankruptcy Judge. Marc Andrews of Danning, Gill, Gould, Diamond & Spector appeared on behalf of plaintiff and Michael R. Hassan of Lord, Bissell & Brook appeared on behalf of defendant.

After full consideration of the moving papers and all supporting papers, the opposition thereto, the entire contents of the court's files and the arguments of counsel, and the Court having issued its Memorandum of Decision Granting Defendant's Cross Motion for Summary Judgment, dated January 9, 1990, and the Court having adopted Findings of Facts and Conclusions of Law submitted by Defendant pursuant to this Court's Memorandum of Decision, it is hereby

ORDERED, ADJUDGED AND DECREED that Summary Judgment be entered in favor of defendant Koch Oil Company and against plaintiff Committee of Creditors Holding Unsecured Claims and that plaintiff pay defendant's costs of suit, and there is no just reason to delay enforcement or appeal of this order.

/s/ James R. Dooley
United States
Bankruptcy Judge

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[Verification omitted in printing.]

[Notice of Entry of Order and Certificate of Mailing omitted in printing.]

APPENDIX F

[Filed September 7, 1995]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: POWERINE OIL COMPANY, Debtor.	No. 92-56077
COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS, Appellant, v. KOCH OIL COMPANY, Appellee.	BAP No. CC-90-1344-OjP ORDER

Before: FARRIS, POOLE and KOZINSKI, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. Therefore, the petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED. Fed. R. App. P. 35(b)

APPENDIX G

§ 547. Preferences.

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or

purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.